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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 722

ALEAZUR BURRELL,
Petitioner, Appellant below,

vs.

UNITED STATES OF AMERICA,
Respondent, Appellee below.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE BLAKELY-DORR-WARREN PRINTING COMPANY, CHICAGO

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Petitioner, Appellant below.

vs.

UNITED STATES OF AMERICA,
Respondent, Appellee below.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

Your petitioner, Aleazur Burrell, hereinafter designated as defendant, petitions for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review and reverse the decision of that Court entered on October 16, 1963 (petition for rehearing overruled on December 2, 1963), affirming the judgment of the District Court of the United States for the Southern District of Indiana convicting the defendant, and others, of a violation of section 174 of Title 21 of the United States Code.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 324 Fed. (2) 115 (Appendix).

JURISDICTION

The judgment of the Court of Appeals was entered on October 16, 1963; a petition for rehearing was filed and overruled on December 2, 1963. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1251 (1).

QUESTIONS PRESENTED

A. The United States wholly failed to produce any evidence at the trial that the alleged narcotic drug introduced into evidence was in fact a narcotic drug as that term has been defined by the Congress of the United States.

B. The Trial Court erred in giving Instruction Number 19 to the jury. This instruction stated that if the jury finds that "heroin" is a narcotic drug then the law is that it is unlawful to import or bring into this country heroin or crude opium for the purpose of manufacturing opium. Section 173 of Title 21 of the United States Code does not prohibit the importation of "heroin," instead it prohibits the importation of crude opium and coca leaves.

STATUTES INVOLVED

Section 173, Title 21, United States Code:

> "It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought

into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported. * * * ."

Section 171, Title 21, United States Code:

"When used in sections 173, 174, 176-184, and 185 of this title—(a) The term 'narcotic drug' shall have the meaning ascribed to the term 'narcotic drug' by section 3228(g) of Title 26; * * ."

Section 3228(g), Title 26, United States Code:

"(g) Narcotic drugs. The words 'narcotic drugs' as used in this part and subchapter A of chapter 23, shall mean any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(1) Opium, isonipecaine, coca leaves, and opiate;

(2) Any compound, manufacture, salt, derivative, or preparation of opium, isonipecaine, coca leaves, or opiate;

(3) Any substance (and any compound, manufacture, salt derivative, or preparation thereof) which is chemically identical with any of the substances referred to in clauses (1) and (2)."

STATEMENT.

On December 18, 1961, the defendant and others were indicted for conspiracy to receive, conceal, buy, sell and facilitate the transportation, concealment and sale of narcotic drugs which had been imported into the United States contrary to law knowing the same to have been unlawfully

imported into the United States in violation of Title 21, United States Code, Section 174. The cause was tried by a jury and the defendant and others were found guilty as charged on July 12, 1962. Judgment was entered upon the verdict on July 25, 1962 (A. 58-59). The government produced one John D. Endriz, a government chemist who was used as an expert witness and testified as to what the powdery substance was that was introduced into evidence at the trial. His testimony is set out on pages 7-10 of the Appendix. In substance he testified that the powdery substance was heroin, commonly known as heroin hydrochloride a chemical product known as diacetyl morphine, a narcotic drug.

Exception was made to the Courts' Instruction Number 19 (A. 10-11).

ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

POINT I.

The defendant earnestly contends that the record of the evidence in this case fails to show that the powdery substance identified by the chemist as heroin hydrochloride a chemical product known as diacetyl morphine is in fact a "narcotic drug" as that term has been defined by Congress. Section 3228(g), Title 26 of the United States Code reads as follows:

> "(g) Narcotic drugs. The words 'narcotic drugs' as used in this part and subchapter A of chapter 23, shall mean any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:
>
> (1) Opium, isonipecaine, coca leaves, and opiate;
>
> (2). Any compound, manufacture, salt, derivative, or preparation of opium, isonipecaine, coca leaves, or opiate;
>
> (3) Any substance (and any compound, manufacture, salt derivative, or preparation thereof) which is chemically identical with any of the substances referred to in clauses (1) and (2)."

The only evidence in the record which identifies this powdery substance is that outlined above by the witness Endriz. There is not one shred of evidence in the record to show that the seized material was "opium, isonipecaine, coca leaves, and opiate or any compound, manufacture, salt derivative or preparation of opium, isonipecaine, coca leaves, or opiate or any substance which is chemically iden-

tical to any of these named substances." The Court of Appeals answered this argument by holding that it is "common knowledge" that heroin, even though it be found in a compound, is always a derivative of opium.

We are unable to agree that it is common knowledge that heroin is a derivative of opium. The word heroin is not defined in Law Dictionary with pronunciations Ballentine, 1948 Edition, published by the Lawyers Co-operative Publishing Company, Rochester, New York; the 1954 pocket part contains the following:

> "heroin. A derivative of opium. *Chadwick* v. *United States* (C. C. A. Tex.), 117 Fed. (2d) 902."

A reading of the Chadwick case clearly shows that no question was raised on appeal as to whether heroin is a derivative of opium. Webster's New International Dictionary of the English Language, Second Edition, published by G. & C. Merriam Company of Springfield, Mass., 1936, contains the following at page 1169:

> "Heroin, n. (Ger. trade name) Pharm. A trade mark applied to, hence (sometimes not cap.), the narcotic bearing this trade-mark."

Neither "heroin" nor "diacetylmorphine" are mentioned in the Pharmacopoeia of the United States of America, Thirteenth Edition, published by authority of the United States Pharmacopoeia Convention, published in 1947 by the Mack Printing Company of Eaton, Pennsylvania.

The word "heroin" appears in the index of The Dispensatory of the United States of America, 25th Edition, Osol and Farrar, published by J. B. Lippincott and Company, Philadelphia, Pennsylvania where we are referred to page 1664. At this page there appears the following: "Diacetylmorphine Hydrochloride, heroin hydrochloride. The drug produced by the action of acetic acid on mor-

phine." This appears in a section of the book titled: "Drugs not official in the United States Pharmacopeia, British Pharmacopeia or the National Formulary."

It would appear to us that the word "heroin" is a trade name of a drug apparently manufactured first in Germany and since it does not appear in the field of pharmacy or medicine in this country we do not see how Courts can judicially know that heroin is a derivative of opium so that it will come within the definition of a "narcotic drug" as defined by Congress in Title 26, United States Code, Section 3228(g).

POINT II.

Instruction 19 as given by the Court is not a correct statement of the law concerning the importation of crude opium into the United States. First the instruction states:

> "If you find from the evidence beyond a reasonable doubt and in accordance with these instructions that heroin is a narcotic drug, then I instruct you that at all times in question in this case Title 21, Section 173 of the United States Code of laws made it unlawful to import or bring into the United States heroin or crude opium for the purpose of manufacturing heroin. In other words, any importation of heroin or crude opium for the purpose of manufacturing heroin into the United States of America is a violation of the law of the United States of America."

Section 173 of Title 21 of the United States Code does not prohibit the importation of heroin. It prohibits the importation of any "narcotic drug." The Court correctly defined the term "narcotic drug" in its Instruction numbered 21 and we again state that the word heroin is not mentioned in that definition as set out by Congress. The Instruction 19 attempts to read into the statute something that is not there and something that is not supplied by the definition of a "narcotic drug."

CONCLUSION.

For the reasons herein stated this Court should grant the writ as prayed for and upon review reverse the judgment of the lower Courts and grant the petitioner a judgment of acquittal.

Respectfully submitted.

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Attorney for Petitioner.

APPENDIX.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

September Term and Session 1963.

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ALEAZUR BURRELL, *Defendant-Appellant.* — No. 13959	Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division.
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JUANITA PIERCE, *Defendant-Appellant.* — No. 13962	
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UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. LONNIE BRAGG, *Defendant-Appellant.* — No. 13965	

October 16, 1963

Before DUFFY, KNOCH and SWYGERT, *Circuit Judges.*

DUFFY, *Circuit Judge.* The indictment herein charged the appellants and three others with having conspired

among themselves and co-conspirators Pullens, Armstrong and Horne, from about March 1, 1961 to the return of the indictment (December 18, 1961) to receive, conceal, transport, purchase and sell narcotic drugs known to have been unlawfully imported into the United States in violation of Title 21 U. S. C. § 174. The indictment charged that it was a part of the conspiracy to procure heroin in Chicago, Illinois, for transportation to and sale in Indianapolis, Indiana.

Before trial, the indictment was dismissed as to Margaret Caldwell. Two defendants, one Lamar Caldwell and James Seals, pleaded guilty and testified for the Government. After a trial by jury, all of the defendant-appellants were found guilty.

In order to understand the alleged general conspiracy and where the Government claims the various defendants fitted into the scheme, it seems necessary that a somewhat detailed statement of facts be made. Viewed most favorably from the standpoint of the Government, the evidence discloses the facts hereinafter set forth.

Pullens and defendant Davis had known each other for about four years. On an occasion they met at Davis' home in Indianapolis. Pullens was a narcotic addict. Davis inquired whether Pullens had a heroin connection, and Pullens answered in the affirmative and stated that he could obtain heroin in Chicago for $160 an ounce. Davis said he would give Pullens twenty-five capsules of narcotics together with transportation and expense money for each trip to Chicago that Pullens might make for him. Pullens accepted the proposition.

The following morning Davis gave Pullens $320 and some money for expenses, and also gave him the use of his automobile, operator's permit and automobile registration. Pullens drove to Chicago where he located Lamar Caldwell. He told Caldwell he had a customer in Indianapolis who

would purchase from one to two ounces each week. Pullens ordered two ounces from Caldwell and gave him $320. The two men drove to the residence of James Seals in Chicago and Caldwell purchased the heroin from Seals. Caldwell gave Pullens his unlisted Chicago telephone number. After leaving Caldwell, Pullens sampled the heroin at a filling station. Arriving in Indianapolis, Pullens met defendant Davis at the latter's home, and the two men "capped" the heroin in gelatine capsules which Davis took out of a washing machine in his kitchen.

During the remainder of March to about the end of April 1961, Pullens, following the pattern of the first trip, made eight to thirteen more trips from Indianapolis to Chicago and purchased heroin for Davis. Customarily, upon the return to Indianapolis, Pullens met Davis at the latter's home and the two men capped the heroin in gelatin capsules after which Davis usually gave twenty-five capsules to Pullens.

Prior to most of these trips, Pullens, at the direction of Davis, telephoned Caldwell in Chicago from Davis' home telephone and either indicated the number of ounces desired or simply said that he, Pullens, would be "up" or in Chicago on the following day. In each instance, Davis gave Pullens the money for the heroin and expenses.

About the end of April 1961, Davis told Pullens he was not satisfied with the weight and measurement of the heroin obtained from Caldwell, and that he was going to contact Russell Horne in order to find a different connection in Chicago.

Shortly thereafter, Davis, in the presence of Pullens, asked Horne whether he would like to earn some heroin in return for introducing him to a narcotics supply in Chicago. Horne agreed. Thereafter the trio drove to Chicago. Horne made his connection in Chicago but was unable to obtain any narcotics. Pullens and Horne, both addicts,

became "sick." Horne said he knew a girl who used to have some "pretty good stuff." The trio drove to the St. Regis Hotel and entered defendant Juanita Pierce's hotel room. Horne introduced Davis and Pullens to her stating that they were from Indianapolis and were interested in finding a "good connection." Pierce stated she knew a man "who had some pretty nice stuff." She left the room for a period. Shortly after her return, defendant Burrell entered the room. He used the name "Daddy Warbucks."

Burrell gave a package of heroin to Pierce stating that was the kind of stuff he handled; that the price was $1.50 per ounce and that Pierce should give some to Pullens and Horne to sample. Pierce, Horne and Pullens sat down at a table and injected themselves with some of the heroin. Davis ordered two ounces from Burrell who left the room and returned a short time later with the two ounces of heroin. Pullens and Horne sampled the heroin and Davis paid Burrell $300. Davis told Burrell that if the stuff was all right, he would be sending Pullens to Chicago once or twice a week to which Burrell replied "O-Kay." Burrell told Pierce to give Pullens a telephone number which she did. This phone was listed in the name of one McKinney who was Burrell's stepfather and where Burrell was then living.

In early May 1961, Davis told Pullens he was ready for him to make another trip to Chicago. He told Pullens to phone the Chicago number given to him (by Pierce). Davis gave Pullens money for narcotics and expenses of the trip, including the use of his (Davis') automobile.

In Chicago, Pullens went to the St. Regis Hotel where he met Pierce in her room. Pullens told Pierce he was unable to contact Burrell. Pierce asked Pullens how much he wanted. He replied "two ounces." Pierce said she would get it and left the room. Shortly thereafter Burrell entered Pierce's room with two ounces of heroin. Pullens

sampled the heroin and paid Burrell $300 that Davis had given him. Burrell gave Pullens the non-published Chicago telephone number of appellant Mattie Moore, and told Pullens in calling that number to ask for Mattie, telling who he was and when he would be in Chicago. Burrell said he could give Pullens a "spoon" of pure stuff for $100. Pullens said he would have to ask Davis about it. Defendant Pierce was present during these conversations. Pullens then left for Indianapolis where he assisted Davis in mixing and capping the heroin.

A few days later, Davis told Pullens in the presence of defendant Bragg, that he was ready for Pullens to make another trip; that he would try the "pure stuff" this time, and that Pullens should call the new Atlantic number. Pullens used Davis' own telephone and contacted defendant Moore saying he would "be in Chicago tomorrow." Moore replied, "Oh yes, he told me you'd call," and told Pullens to contact her in Chicago.

On the following day, Davis gave Pullens $1,000 for heroin, also expense money, and supplied him with his automobile, driver's permit and automobile registration. After reaching Chicago, Pullens called Moore. She told him to go to the St. Regis Hotel. He met Pierce in her room and told her he was expecting Burrell. Later Burrell arrived and Pullens ordered ten spoons. Burrell left and returned in about an hour with the heroin. Pullens sampled the heroin in Pierce's presence and handed $1,000 to Burrell. Burrell mixed a shot with some mannite and gave some heroin to Pierce who also shot it. Pullens returned to Indianapolis, gave Davis seven packages of heroin but held out the remaining three packages. Davis and Pullens then mixed the heroin with manitol and milk sugar and capped it. After Davis gave Pullens the usual twenty-five capsules, Pullens split the three remaining packages with Bragg.

Throughout the remainder of May and up to June 14, 1961, Pullens made from five to ten additional trips to Chicago and obtained narcotics for Davis. On occasion, Pullens travelled to Chicago and returned by bus. On these trips, Pullens contacted Moore by telephone and she would tell him where to meet Warbucks (Burrell). Pullens would meet Burrell in Pierce's hotel room and purchase heroin from Burrell in Pierce's presence with money supplied by Davis. Pierce, who obtained her supply from Burrell, loaned heroin to Pullens while he waited in her hotel room for Burrell. Later, Pullens would repay the loan when he received his supply from Burrell. On occasion Bragg assisted Pullens and Davis in capping the heroin. Any amount held out by Pullens from Davis was split by Pullens with Bragg.

In late May 1961, Davis told Pullens he was contemplating letting Charles Armstrong sell narcotics for him because Bragg lived too far from a certain location in Indianapolis where most of the addicts lived. Shortly thereafter, Armstrong agreed, in the presence of Bragg, Pullens and Davis, to sell narcotics for Davis who was to receive two dollars for each capsule sold with Armstrong retaining one dollar. This was the same arrangement Bragg had with Davis.

In late May 1961, because of the suspected presence of a narcotic officer in the neighborhood, Pullens, Davis and Bragg mixed and capped heroin in the home of Pullens' mother.

On June 14, 1961, Pullens and Armstrong made another trip to Chicago. Pullens telephoned defendant Moore and she directed them where to go. Moore had been selling heroin for Burrell on consignment. She said she had a boy friend buying stuff from New Orleans and would give Pullens and Armstrong a better deal. Later that day, Burrell telephoned Moore's apartment, and Pullens who

answered the telephone ordered some heroin. Burrell subsequently arrived at the apartment and gave some of the heroin to Moore and gave Pullens seven spoons in exchange for $700 supplied by Davis.

On the return to Indianapolis, Pullens and Armstrong were arrested by a city motor patrolman and two city narcotic detectives. The automobile in which they were riding had been checked at fifty miles per hour in a thirty mile zone.

We reject the claim of each defendant-appellant that the evidence in this record is insufficient to support the verdict. A conspiracy was clearly shown centering around Davis with Pullens as his agent, to obtain heroin in Chicago for distribution and sale in Indianapolis.

Davis was the dominant member of the conspiracy. Burrell (Daddy Warbucks) was the dominant member residing in Chicago. In Indianapolis, Davis, Pullens and occasionally Bragg, mixed and capped the heroin obtained by Pullens in Chicago. Bragg, Armstrong and one Bellamy sold the heroin capsules in Indianapolis. All of the Indianapolis defendants knew the source of the narcotics.

Several of the appellants make some point of the fact that the Indianapolis group was supplied by two Chicago supplier groups and argue this shows two separate conspiracies. We think there was but one conspiracy which had one object, namely, to procure heroin in Chicago for transportation to and sale in Indianapolis. Each supplier knew the heroin was destined for Indianapolis and actively and purposely furthered this illegal object.

Appellant Davis urges the defense of illegal search and seizure, but neither Davis nor any other defendant saw fit to move to suppress the seized evidence on these grounds either at or before the trial. None of the appellants objected to the introduction of the seized materials on the

ground that their constitutional rights had been violated. We, therefore, do not consider this point. *United States* v. *Sferas*, 210 F. 2d 69.

We overrule the contention of defendant Burrell that since the first trial ended in a mistrial,[1] the double jeopardy provisions of the Fifth Amendment barred the instant prosecution. The mistrial was granted on Burrell's motion and with his express consent. He cannot successfully plead the bar of double jeopardy. *Gori* v. *United States*, 367 U. S. 364; *Raslich* v. *Bannan*, 6 Cir., 273 F. 2d 420.

Burrell and other defendants argue the evidence in this case fails to show that the powder substance identified by the Government chemists as heroin hydrochloride is, in fact, a narcotic drug as defined by Title 26 U. S. C. § 3228(g). We think this contention cannot be sustained. The Government chemists, in describing the product, said it was "... A chemical product known as diacetyl morphine, a narcotic drug." The defendants argue it should have been shown that the seized material was opium, isonipecaine, coca leaves or opiate, or any derivative thereof.

This Court passed on this contention in *United States* v. *Pisano*, 193 F. 2d 355. We said at page 359: "We are not concerned with technical chemical designations. We know from common knowledge that heroin, even though it be found in a compound, is always a derivative of opium. As we said in *United States* v. *Holmes*, 7 Cir., 187 F. 2d 222, 225, 'this court, as a matter of judicial knowledge, is justified in affirming the trial court's finding that heroin is a derivative of opium.' Such was the conclusion also in *Hughes* v. *U. S.*, 8 Cir., 253 F. 2d 543, 545."

[1] The Court, upon motion had ordered a separation of witnesses. Thereafter, two witnesses had occupied the same jail cell and discussed the case before trial. When this was brought to the attention of the Court, a mistrial was ordered.

Defendant Moore claims instructions No. 20, 26 and 19 were erroneous. No. 20 had to do with possession of narcotics. We think this instruction was without error. *United States* v. *Santore*, 290 F. 2d 51. Instruction No. 26 was on aiding and abetting. We think it contains a correct statement of the law. *Ingram* v. *United States*, 360 U. S. 672, 678; *Pereira* v. *United States*, 347 U. S. 1, 9. Instruction No. 19 as to the definition of narcotic drugs was not erroneous.

Defendant Davis objected to instruction No. 16, claiming it was not "full enough." We hold this instruction was sufficient. Davis also objected to instruction No. 25 on the nature of the conspiracy. We can find no error in this instruction.

Admittedly, the Government had weaker cases as to defendants Juanita Pierce and Mattie Moore. However, from the evidence hereinbefore set out, it clearly appears that Miss Moore had constructive possession of the narcotics, the purchase, transportation and sale of which was the object of the conspiracy. She, in effect, managed the sale on the first contact as well as many times thereafter. Miss Pierce was a knowing member of the conspiracy and actively promoted its ends. She played a vital part in making the arrangements for a number of the transactions.

Both Miss Pierce and Miss Moore took the orders, made arrangements and even used their own premises for the purpose of transfers. In *United States* v. *Wright* 309 F. 2d 735, the Court found sufficient evidence of constructive possession of narcotics under circumstances "when viewed in [their] totality" which were much less compelling than in the instant case.

Various other alleged errors have been asserted by the different defendants. We have considered them but hold them to be without substance. We find no reversible error as to any of the defendants in the instant case.

Mr. Alan H. Lobley, Mr. Leonard J. Betley, Mr. Marvin L. Hackman, Mr. James Manahan and Mr. Howard J. DeTrude, Jr., all members of the Indianapolis bar, represented the various defendants on this appeal as court-appointed counsel. They made the trip from Indianapolis to Chicago to present oral arguments. Their services were in the highest tradition of the American bar. We thank them for their services and compliment them on the excellent manner in which they prepared their briefs and presented oral argument.

AFFIRMED.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 722

ALEAZUR BURRELL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 913 Misc.

MATTIE MOORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Vol. II, 1-8)[1] is reported at 324 F. 2d 115.

[1] A two volume certified record is on file in No. 722, to which reference will be made by volume number. We are lodging with the Clerk of this Court a one volume appendix of the trial proceedings, to which reference is made as "G. App."

JURISDICTION

The judgment of the court of appeals was entered on October 16, 1963. Petitions for rehearing were denied on December 2, 1963. The petitions for writs of certiorari were filed on December 30, 1963 (No. 913 Misc.) and January 2, 1964 (No. 722). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In No. 722:

1. Whether the evidence showed that heroin is a narcotic drug.

2. Whether the court properly instructed the jury on the illegality of importation of "narcotic drugs" under 21 U.S.C. 173 and 174.

In No. 913 Misc.:

Whether the evidence shows sufficient possession by petitioner Moore to justify application of the presumption of knowledge of unlawful importation.

STATUTES INVOLVED

Section 171 of Title 21 U.S.C. provides in pertinent part:

> When used in sections 173, 174 * * * of this title—
>
> (a) The term "narcotic drug" shall have the meaning ascribed to the term "narcotic drugs" by section 3228(g) of Title 26 * * *.

Section 173 of Title 21 U.S.C. provides in pertinent part:

> It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin.

* * * * *

Section 4731(a) of Title 26 U.S.C., formerly section 3228(g) of Title 26 (Supp. I, 1952 ed.), provided:

> The words "narcotic drugs" as used in this part shall mean any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis;
>
> (1) Opium, isonipecaine, coca leaves, and opiate;
>
> (2) Any compound, manufacture, salt, derivative, or preparation of opium, isonipecaine, coca leaves, or opiate;
>
> (3) Any substance (and any compound, manufacture, salt, derivative, or preparation thereof) which is chemically identical with any of the substances referred to in clauses (1) and (2).

STATEMENT

Petitioners were convicted in the United States District Court for the Southern District of Indiana of conspiracy to deal in unlawfully imported narcotics in violation of 21 U.S.C. 174. Petitioner Burrell was sentenced to imprisonment for ten years and fined $10,000. Petitioner Moore was sentenced to imprisonment for five years. On appeal, the convictions were unanimously affirmed (Vol. II, 1–8; Pet. No. 722, 9–18). 324 F. 2d 115.

Co-defendant Davis was selling narcotics in Indianapolis, using co-conspirator Pullens to bring in the heroin from Chicago (G. App. 98–121). In April 1961, Davis sought a new source of supply. He and Pullens were introduced to petitioner Burrell by Miss Pierce, a co-defendant, and purchased heroin from him at the St. Regis Hotel in Chicago (G. App. 133–137). On a subsequent trip, Burrell gave Pullens the non-published Chicago telephone number of the petitioner Mattie Moore and told him to call that number and ask for "Mattie" and let her know when he would be in Chicago (G. App. 147–148). A few days later, when Pullens called Miss Moore to tell her that he would be in Chicago the next day (G. App. 65–66, 151; see G. App. 200–201), she said, "[O]h yes, he told me you'd call." She told Pullens to communicate with her when he arrived (G. App. 150–151). When Pullens called Miss Moore in Chicago the next day she told him to go to the St. Regis Hotel as he had before. In Miss Pierce's room at the hotel, Pullens saw petitioner Burrell who said that the "girl" had told him

that Pullens had called. Pullens bought $1,000 worth of heroin from Burrell (G. App. 153).

Throughout the remainder of May and up to June 14, 1961, Pullens made several more trips to Chicago and purchased narcotics for Davis (G. App. 156–157). On these trips Pullens always called Miss Moore by telephone and she "directed" him "[w]here to go, what to do, meet Warbucks [Burrell] and get the heroin" (G. App. 202, 211).

On June 14, when Pullens telephoned Miss Moore, she instructed them to go to a certain address on Oakenwald Street which turned out to be her apartment (G. App. 167, 264–265). There Pullens inquired whether Burrell had communicated with her. She replied in the negative, stating that she had not been able to reach him all morning (G. App. 266). She then placed a telephone call and left word for Burrell to call her back (G. App. 168). She said that she was "waiting on him, too; he was supposed to bring her some stuff, heroin" (G. App. 168, 266). Miss Moore said that she had a boy-friend bringing "stuff" from New Orleans and that she would give Pullens and Armstrong a "better deal" than Burrell was giving (G. App. 169, 203–204; see G. App. 174, 274–275, 282). Pullens, co-conspirator Armstrong (who had accompanied Pullens from Indianapolis) and Miss Moore drove to the St. Regis Hotel where Pullens and Armstrong met Miss Pierce and purchased some heroin for their own use while Miss Moore remained in the automobile (G. App. 170–171, 269–270). The trio then returned to Miss Moore's

apartment where Pullens and Armstrong, in Miss Moore's presence, injected heroin into their veins (G. App. 171, 270).

Later that day and while Miss Moore and Armstrong were out of the apartment, Burrell telephoned the apartment, and Pullens, who answered the telephone, ordered some heroin (G. App. 168–169; see G. App. 267). Burrell subsequently arrived at Miss Moore's apartment with a quantity of heroin (G. App. 172, 271). He gave some to Miss Moore and gave Pullens seven spoons of heroin in exchange for the money supplied by Davis (G. App. 172–173, 179, 180, 186–187, 271–272, 283–284). After Burrell left the apartment, an addict entered and purchased heroin from Miss Moore and "shot" it there (G. App. 173, 187, 273–274). Pullens and Armstrong then sampled heroin there (G. App. 173–174, 272–273). Miss Moore subsequently took Armstrong's telephone number and gave him her number, stating that Armstrong and Pullens could do business with her when her friend arrived from Louisiana with narcotics (G. App. 274–275, 282; see G. App. 174).

Pullens and Armstrong were arrested while proceeding along U.S. Route 52 in Indianapolis. Inside their socks, Indianapolis narcotic detectives found seven packages of heroin (G. App. 15, 21, 27, 32, 40, 51–52; see G. App. 175, 176, 179, 276, 277).

ARGUMENT

1. Petitioner Burrell contends (No. 722, 5–7) that the evidence was insufficient to show that the heroin with which the conspiracy was concerned was a "nar-

cotic drug" within the meaning of 21 U.S.C. 171, 173 and 174, and 26 U.S.C. 4731(a), *supra*, *i.e.*, opium, isonipecaine, coca leaves or opiate, or any derivative thereof. There was, however, ample evidence at the trial that the conspirators dealt in heroin which was shown to be a derivative of opium. Law enforcement officials testified that they conducted field tests of the substances removed from Pullens and Armstrong at the time of their arrests, and that the tests were "positive", which indicated to them the presence of a "derivative of opium" (G. App. 28–30, 31, 32–33, 34, 40–41, 68–71, 75–77; see G. App. 53–54, 57). Petitioner Burrell does not even allude to these tests. A chemist testified that the powder in question contained about 35% diacetyl morphine hydrochloride, a substance commonly known as heroin hydrochloride, a "narcotic drug" (G. App. 219–220). This was sufficient to show that the heroin with which the conspiracy was concerned was in fact derived from opium within the meaning of 26 U.S.C. 4731(a). See *United States* v. *Bailey*, 277 F. 2d 560, 565 (C.A. 7).

Moreover, there would be no merit in the contention even if there had been no evidence adduced that heroin is derived from opium. As the court below correctly held, it is a matter of common knowledge that heroin, though found in a compound, is a derivative of opium. *United States* v. *Pisano*, 193 F. 2d 355, 359 (C.A. 7), and cases cited; *United States* v. *Holmes*, 187 F. 2d 222, 225 (C.A. 7), certiorari denied, 341 U.S. 948, and cases cited.

2. Petitioner Burrell also contends (No. 722, 7) that the trial court erred in giving Instruction No.

19 because 21 U.S.C. 173, *supra*, does not by its terms bar the importation of heroin. The short of the matter, however, is that Instruction No. 19 (Vol. I, 28–29) simply told the jury that the importation of heroin was prohibited under 21 U.S.C. 173 only if the jury first determined beyond a reasonable doubt and "in accordance with [its] instructions that *heroin is a narcotic drug*" (emphasis added), a term which the court defined in Instruction No. 21 (Vol. I, 34–35), quoting the definition of narcotic drugs from 26 U.S.C. 4731(a).

3. Petitioner Moore contends (No. 913 Misc., 8–12) that the evidence is insufficient to show that she had the requisite dominion and control over the narcotics involved in the conspiracy to support a finding of constructive possession of those narcotics. The court below, however, correctly held that sufficient possession was shown by virtue of the fact that Miss Moore managed heroin sales when she "took the orders, made arrangements and even used [her] own premises for the purposes of transfers." 324 F. 2d at 119. As shown by the Statement, *supra*, after Burrell gave Pullens the telephone number of Miss Moore, she directed Pullens "[w]here to g , what to do, meet Warbucks [Burrell] and get the heroin" (G. App. 202, 211). On the several narcotics transactions that followed, Pullens, pursuant to these directions, went to the St. Regis Hotel where he met Miss Pierce and Burrell and purchased heroin from Burrell. On June 14, 1961, when Burrell came to Miss Moore's apartment (after she had invited Pullens there and had

left word for Burrell to telephone the apartment), he gave narcotics to Pullens and to Miss Moore (G. App. 167–168, 172–173, 179, 180, 186–187, 264–266, 271–272, 283–284). Although no principal-agent relationship between Miss Moore and Burrell was established, the evidence nevertheless sufficiently shows that Miss Moore had a close working relationship with Burrell and that, without difficulty, she was able to assure production and delivery of heroin to Pullens as a matter of course. This is constructive possession of narcotics. *E.g., United States* v. *Hernandez*, 290 F. 2d 86, 90 (C.A. 2); *United States* v. *Gibson*, 310 F. 2d 79, 81 (C.A. 2); *Cellino* v. *United States*, 276 F. 2d 941, 943, 946 (C.A. 9); *United States* v. *Wright*, 309 F. 2d 735, 737–739 (C.A. 7), certiorari denied, 372 U.S. 929. She was not a casual facilitator or aider and abettor as in *Hernandez* v. *United States*, 300 F. 2d 114 (C.A. 9), or *United States* v. *Jones*, 308 F. 2d 26 (C.A. 2).

Moreover, on June 14, 1961, a heroin transaction between Pullens and Burrell took place in petitioner's apartment, in her presence and with at least some arrangement on her part. That alone was sufficient evidence to show dominion and control over those narcotics; the control which Miss Moore exercised over her own apartment carried with it an incidental control over all that took place there in her presence. See *e.g., Evans* v. *United States*, 257 F. 2d 121, 128 (C.A. 9), certiorari denied, 358 U.S. 866; *Arellanes* v. *United States*, 302 F. 2d 603 (C.A. 9), certiorari denied, 371 U.S. 930. While the proof does not show

that the narcotics which Miss Moore physically received from Burrell and sold to an addict on June 14, 1961, were part of the narcotics involved in the conspiracy to transport heroin to Indianapolis for distribution and sale there, her ability to arrange for the delivery of narcotics, both to herself and to Pullens, serves to emphasize the fact that she did, in a realistic sense, control the narcotics which were transferred on that date and on the many occasions prior thereto.[2]

CONCLUSION

For the reasons set forth, we respectfully submit that the petitions for writs of certiorari should be denied.

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[2] While it is true that a conflict exists in the circuits as to whether the possession of narcotics by one conspirator may legally be imputed to other non-possessing conspirators (compare *Valentine* v. *United States*, 293 F. 2d 708 (C.A. 8); certiorari denied, 369 U.S. 830, with *Hernandez* v. *United States*, 300 F. 2d 114 (C.A. 9)), that conflict has no application to the instant case since the jury was instructed only along well defined and established lines of actual and constructive possession of narcotics (Vol. I, 29–31, 35–36). The courts below did not rely upon any theory of imputed possession from one conspirator to another.

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